Pilecon Engineering Bhd v Malayan Banking Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1577–09 OF 2011
MARY LIM J
21 DECEMBER 2011

Civil Procedure — Jurisdiction — Courts of co-ordinate jurisdiction — Whether High Court could set aside regular and final order of another High Court — Whether any evidence of illegality, lack of jurisdiction or violation of rules of natural justice — Plaintiff failed to set aside order in High Court — Fresh suit filed to set aside order — Whether plaintiff barred from re-litigating issues determined in earlier setting-aside proceedings — Whether justice of case warranted grant of Erinford injunction — Whether proper case to strike out claim

The plaintiff had issued redeemable convertible secured loan stocks ('RCSLS') in favour of its creditors, the defendant banks. The 12th defendant was appointed as the trustee for the defendant banks under a trust deed and as the security trustee holding the plaintiff's assets as security for the RCSLS pursuant to a security trust deed. When the plaintiff defaulted in the RCSLS payments, the trustee sought to obtain a special resolution at a meeting of the RCSLS holders to authorise it to recover the payments due under the trust deed and realise the securities under the security trust deed. When the special resolution failed to be carried out, the defendant banks filed a court action to compel the trustee to take steps to recover the amounts due under the trust deed and to realise the securities. The orders sought were granted ('the OS order'). The plaintiff, which was not party to the proceedings, intervened to set aside the OS order but its application was dismissed. Its appeal against that decision to the Court of Appeal was also dismissed. So was its application for leave to appeal to the Federal Court. Following its failure to set aside the OS order in the High Court, the plaintiff sued the trustee in another High Court to remove it as the trustee and the security trustee and to injunct it from taking action to recover the amount outstanding under the RCSLS. The interim injunction the plaintiff initially succeeded in obtaining was set aside after the defendant banks were allowed to intervene and were heard in an inter partes hearing. That decision was upheld by the Court of Appeal. The plaintiff then filed the instant action claiming the OS order was a nullity and ought to be set aside as it was, inter alia, obtained without notice to the plaintiff and in breach of natural justice, that it was in breach of the terms of the trust deed and that it prejudicially affected the plaintiff and its assets as the question of its indebtedness to the defendant banks had not been determined in the first place. The plaintiff applied (vide encl 3) for an interim injunction to restrain the defendants from enforcing the OS order pending disposal of the action. It

A also later applied, vide encl 42, for an Erinford injunction. The defendant banks and the trustee respectively filed encls 21 and 30 to strike out the plaintiff's action under O 18 r 19(1)(a) to (c) of the Rules of the High Court 1980.

B **Held**, dismissing encls 3 and 42 with costs, allowing encls 21 and 30 with costs and striking out the claims against the defendants:

(1) The court had no jurisdiction to set aside what was a perfectly regular and final order made by another court of competent concurrent jurisdiction (see paras 71 & 76).

C

(2) The plaintiff's pleaded case and evidence did not show that the OS order amounted to a contravention of some written law or rules of natural justice or that it defied a substantive statutory prohibition so as to render the order null and void for illegality or lack of jurisdiction (see para 77).

D

(3) The arguments on breach of natural justice advanced in this court were the same ones made before the court that issued the OS order and they did not find favour with that court. That alone rendered the instant claim bad by reason of res judicata. The decision of the Court of Appeal affirming the High Court's decision and the Federal Court's refusal to grant leave to appeal, in a certain sense, fortified the application of res judicata here (see para 89).

E

(4) It was open to the appellate courts to set aside the OS order for any of the reasons proffered by the plaintiff, which reasons were same ones relied on in the present claim. Yet, both the Court of Appeal and Federal Court declined to do so. The issue of the alleged invalidity of the OS order was well and fully determined and could not now be re-litigated (see para 51).

F

(5) The justice of the case did not lie in granting an Erinford injunction. The conditions for maintaining status quo were not present. There had been no development since the dismissal of the application for an interim injunction to warrant the concerns of the plaintiff and no steps had been taken by any of the defendants towards execution of the OS order (see paras 68 & 67).

G

H (6) With the multiple suits filed, all in respect of the same complaint, the plaintiff's action was akin to abuse of process. It was plainly and obviously an unsustainable claim which was bound to fail if it proceeded to trial (see paras 59 & 91).

I **[Bahasa Malaysia summary**

Plaintif telah mengeluarkan saham pinjaman bercagar boleh tukar boleh tebus ('RCSLS') memihak pemiutang-pemiutangnya, defendan bank. Defendan ke-12 dilantik sebagai pemegang amanah untuk defendan bank di bawah surat ikatan amanah dan sebagai pemegang amanah jaminan memegang aset-aset

plaintif sebagai jaminan untuk RCSLS berikutan surat ikatan amanah jaminan. Apabila plaintif mengingkari bayaran-bayaran RCSLS, pemegang amanah memohon untuk mendapatkan resolusi khas di mesyuarat pemegang-pemegang RCSLS untuk memberikan ia kuasa untuk mendapatkan semula bayaran-bayaran yang kena dibayar dan merealisasikan jaminan-jaminan di bawah surat ikatan amanah. Apabila resolusi khas tersebut gagal untuk dilaksanakan, defendan bank memfailkan tindakan mahkamah untuk memaksa pemegang amanah mengambil langkah-langkah untuk mendapatkan semula jumlah yang kena dibayar di bawah surat ikatan amanah dan untuk merealisasikan jaminan-jaminan tersebut. Perintah-perintah yang dipohon diberikan ('perintah SP'). Plaintif, yang bukan pihak kepada prosiding, mencelah untuk mengenepikan perintah SP tetapi permohonannya ditolak. Rayuannya terhadap keputusan tersebut ke Mahkamah Rayuan juga ditolak. Begitu juga permohonannya untuk izin merayu ke Mahkamah Persekutuan. Berikutan kegagalannya untuk mengenepikan perintah SP di Mahkamah Tinggi, plaintif menyaman pemegang amanah di Mahkamah Tinggi yang lain untuk menyingkirkannya sebagai pemegang amanah dan pemegang amanah jaminan dan untuk menghalang ia daripada mengambil tindakan bagi mendapatkan semula jumlah yang belum dijelaskan di bawah RCSLS. Injunksi interim yang pada mulanya plaintif berjaya mendapatkannya diketepikan selepas defendan bank dibenarkan untuk mencelah dan didengar dalam pendengaran inter partes. Keputusan tersebut disahkan oleh Mahkamah Rayuan. Plaintif kemudiannya memfailkan tindakan ini mendakwa perintah SP adalah terbatal dan patut diketepikan kerana ia, antara lain, diperolehi tanpa notis kepada plaintif dan memungkiri keadilan asasi, bahawa ia memungkiri terma-terma surat ikatan jaminan dan bahawa ia secara prejudis menjejaskan plaintif dan aset-asetnya memandangkan persoalan keberhutangannya kepada defendan bank tidak ditentukan pada mulanya. Plaintif memohon (melalui lampiran 3) injunksi interim bagi menghalang defendan-defendan daripada menguatkuasakan perintah SP tersebut sementara menunggu pendengaran tindakan tersebut. Plaintif juga kemudiannya memohon, melalui lampiran 42, untuk injunksi Erinford. Defendan bank dan pemegang amanah masing-masing memfailkan lampiran 21 dan 30 untuk membatalkan tindakan plaintif di bawah A 18 k 19(1)(a) hingga (c) Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, menolak lampiran 3 dan 42 dengan kos, membenarkan lampiran 21 dan 30 dengan kos dan membatalkan tuntutan-tuntutan terhadap defendan-defendan:

(1) Mahkamah tidak mempunyai bidang kuasa untuk mengenepikan apa yang adalah perintah biasa dan muktamad yang sempurna dibuat oleh mahkamah lain yang kompeten bidang kuasa bersama (lihat perenggan 71 & 76).

(2) Kes yang diplid plaintif dan keterangan tidak menunjukkan bahawa

perintah SP menyalahi beberapa undang-undang bertulis atau peraturan-peraturan keadilan asasi atau bahawa ia mengingkari larangan statutori substantif untuk membuatkan perintah tak sah dan terbatal kerana kepenyalahan undang-undang atau ketiadaan bidang kuasa (lihat perenggan 77).

(3) Hujahan-hujahan atas kemungkiran keadilan asasi yang dikemukakan dalam mahkamah ini adalah sama seperti yang dibuat di hadapan mahkamah yang mengeluarkan perintah SP dan ia tidak disokong oleh mahkamah tersebut. Ini saja membuatkan tuntutan ini tidak kukuh atas alasan res judicata. Keputusan Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan penolakan Mahkamah Persekutuan untuk memberikan izin untuk merayu, dari satu segi, mengukuhkan permohonan res judicata ini (lihat perenggan 89).

(4) Ia terbuka kepada mahkamah-mahkamah rayuan untuk mengenepikan perintah SP untuk apa-apa alasan yang dikemukakan oleh plaintif, alasan-alasan yang mana adalah alasan-alasan yang sama yang digunakan dalam tuntutan ini. Tetapi kedua-dua Mahkamah Rayuan dan Mahkamah Persekutuan menolak daripada berbuat demikian. Isu ketaksahan yang didakwa terhadap perintah SP telah ditentukan dengan betul dan sepenuhnya dan sekarang ini tidak boleh dilitigasikan semula (lihat perenggan 51).

(5) Keadilan kes ini tidak bergantung dalam memberikan injunksi erinford. Syarat-syarat untuk mengekalkan status quo tidak terdapat. Tidak terdapat perkembangan semenjak penolakan permohonan untuk injunksi interim untuk mewajarkan perkara yang membimbangkan plaintif dan langkah-langkah tidak diambil oleh mana-mana defendan terhadap pelaksanaan perintah SP tersebut (lihat perenggan 68 & 67).

(6) Dengan pelbagai tindakan difailkan, kesemuanya berkaitan aduan yang sama, tindakan plaintif sama seperti penyalahgunaan proses. Ia adalah jelas tuntutan yang tidak boleh dikekalkan yang akan gagal jika ia diteruskan dengan perbicaraan (lihat perenggan 59 & 91).]

Notes

For cases on courts of co-ordinate jurisdiction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4870–4871.

Cases referred to

American Cyanamid Co v Ethicon [1975] AC 396 (refd)

Asia Commercial Finance (M) Bhd v Kawal Telti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong [1999] 3 SLR 333, HC (refd)
Celcom (Malaysia) Bhd v In miss Communication Sdn Bhd [2003] 3 MLJ 178, HC (folld)
Erinford Properties Ltd v Cheshire CC [1974] Ch 261, 268 (folld)
Grafton Isaacs v Emery Robertson [1985] 1 AC 97, PC (refd)
Hartecon JV Sdn Bhd Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)
Hock Hua Bank v Sahari Murid [1981] 1 MLJ 143, FC (refd)
Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghom Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)
Isaacs v Robertson [1985] AC 97 (refd)
J&C New Consortium Sdn Bhd (Malayan Banking Bhd, Garnishee & Anor [2006] 1 MLJ 587, HC (refd)
Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (folld)
Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (Receiver and Manager appointed) [2008] 1 MLJ 317, CA (folld)
Rekbab Das v M Shobai and another AIR 1923 Allahabad 495 (refd)
Riches v Director of Public Prosecutions [1973] 1 WLR 1019 (folld)
Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132, FC (refd)
Sindoma Realty Sdn Bhd v Overseas-Chinese Banking Corpo Ltd & Others [1989] 1 MLJ 377, HC (refd)
Subashini Rajasingam v Saravanan Thangathoray (No 2) [2007] 3 CLJ 209, CA (folld)
Tien Ik Sdn Bhd v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (refd)

Legislation referred to

Companies Act 1965 s 176
Courts of Judicature Act 1964 s 96
Rules of the High Court 1980 O 18 r 19(1), O 18 r 19(1)(a), (b), (c)
Trust Companies Act 1949

Edwin Lim (Richard Lee with him) (Richard Lee) for the plaintiff.
SM Yoong (CY Kong with him) (Shook Lin & Bok) for the first to 11th and 13th defendants.
BH Yap (Vanessa Wong with him) (Mah-Kamariyah & Philip Koh) for the 12th defendant.

Mary Lim J:

[1] There are two sets of defendants. For convenience, I shall refer to the set

represented by Miss Yoong Sin Min as the 'Defendant Banks' and the single 12th defendant represented by Mr BH Yap as, the 'trustee'.

[2] The facts in this case have been recounted no less than twice in two related cases. In one of those two cases, arguments had even been taken to the Federal Court in an application for leave to appeal under s 96 of the Courts of Judicature Act 1964 (Act 91). Nevertheless, those facts need retelling together with what actually transpired in those two cases as those facts form the substratum of the present suit and are absolutely vital for the proper understanding and appreciation of the present case.

SALIENT FACTS

The RCSLS

[3] The plaintiff is a public company of limited liability. The defendant banks had separately extended various credit facilities to the plaintiff. The trustee is a trust corporation established under the Trust Companies Act 1949. It provides professional trust services.

[4] The plaintiff ran into financial difficulties and was unable to settle its debts. On 12 January 2006, pursuant to a scheme of arrangement sanctioned by the court under s 176 of the Companies Act 1965, the plaintiff issued and caused to be constituted redeemable convertible secured loan stocks ('RCSLS') in the aggregate nominal value of RM120m with interest at 5%pa payable semi-annually. The defendant banks are RCSLS holders. At the same time, the plaintiff issued and caused to be constituted irredeemable convertible unsecured loan stocks ('PEB-ICULS') in the aggregate nominal value of RM58,483,707 to the plaintiff's general unsecured creditors with coupon at a fixed rate of interest at 5%pa payable semi-annually. These ICULS were said to be held by over 500 different holders comprising mainly individuals.

[5] The 12th defendant was appointed as the trustee for the defendant banks/holders of the RCSLS; and as the security trustee holding the plaintiff's moveable and immovable assets said to be worth RM194,082,977 as security for the defendant banks/holders of the RCSLS. This is reflected in the trust deed and security trust deed both dated 6 November 2006 entered into between the plaintiff and the 12th defendant. The plaintiff further executed a power of attorney in favour of the trustee.

[6] Under the terms of the trust deed, the plaintiff covenanted, inter alia:

(a) to redeem the RCSLS on maturity dates as follows:

RCSLS	MATURITY DATE
RM10m	three months from issue date, ie by 28 March 2007
RM25m	15 months from issue date, ie by 28 March 2008
RM40m	27 months from issue date, ie by 27 March 2009
RM45m	39 months from issue date, ie by 26 March 2010

(b) and to pay interest on the outstanding RCSLS at the rate of 5%pa semi-annually.

[7] The plaintiff made the first tranche but failed to pay the remaining tranches on the maturity dates as set out above. The RCSLS were not redeemed on the last maturity date of 26 March 2010.

[8] As trustee, the 12th defendant convened an extraordinary general meeting of the RCSLS holders on 30 April 2010 to pass a special resolution that the trustee be authorised to take all steps and action against the plaintiff to enforce payments of all amounts said to be due and payable under the RCSLS trust deed, and to realise security in accordance with the security trust deed; as well as to declare an event of default. The EGM failed to carry the special resolution as the requisite 75% vote was not secured. Only 74.2% of the RCSLS holders resolved to declare an event of default against the plaintiff whilst the remaining 24.8% voted against the special resolution. It appears that 24.8% which were initially held by Danaharta Managers Sdn Bhd and Danaharta Urus Sdn Bhd had been sold to a third party which was somehow related to or was procured by the plaintiff. That is however irrelevant for the present purpose. The special resolution was not carried.

Originating Summons No D24-NCC-337 of 2010 (the OS)

[9] The defendant banks then decided to file an action against the trustee. The trustee was the only defendant in that action filed in the High Court at Kuala Lumpur Originating Summons No D24-NCC-337 of 2010 ('the OS'). The object of the OS was to compel the trustee to take all necessary steps and actions to recover the amounts due under the RCSLS for the benefit of the holders, the defendant banks. On 27 October 2010, the orders sought were granted. On 9 December 2010, the plaintiff applied to intervene in the OS and to set aside the orders granted on 27 October 2010. On 27 January 2011, the application was dismissed after the court had heard and considered submissions from all counsel. The plaintiff appealed against that decision. On 27 April 2011, the appeal was dismissed by the Court of Appeal and on 29 June 2011, the plaintiff failed to secure leave to appeal to the Federal Court.

Civil Suit No 22NCVC-131 of 2011 (the Shah Alam Suit)

[10] After the dismissal by the High Court, on 31 January 2011, the plaintiff

sued the trustee at the High Court at Shah Alam. Although there were declaratory orders sought, the primary relief in that suit was the removal of the defendant as trustee and security trustee as well as to perpetually restrain the defendant/trustee from taking action to recover the outstanding RCSLS. On 7 February 2011, the plaintiff obtained an ex parte interim injunction. The banks applied to intervene and oppose the interim injunction at the inter partes hearing.

[11] After considering the oral and written submissions of all parties, on 15 April 2011, Her Ladyship Madam Justice Lim Yee Lan allowed intervention by the banks but refused the plaintiff's application for an interim injunction. On appeal, the decision of Her Ladyship was upheld by the Court of Appeal on 4 October 2011. The plaintiff's application for leave to appeal to the Federal Court is fixed for hearing on 16 February 2011.

THE PRESENT CLAIM

[12] On 29 September 2011, the plaintiff filed the present suit against 13th defendants comprising the 12th defendant banks and the trustee (the 13th defendant was added in after its leave to intervene as a defendant was not objected to by the plaintiff).

[13] In this claim, after explaining about the trust deed, the plaintiff identified at para 8 of the amended statement of claim what it perceived to be the 'material terms in the RCSLS Trust Deed', namely cll 8, 8A, 8A.4; para 22 of the Third Schedule of the RCSLS trust deed; the conditions of the RCSLS found in the Second Schedule of the trust deed in particular conditions 12, 12.3 and 13.4. Thereafter, in respect of the EGM and the OS, the plaintiff claimed at para 16A:

> 16A. The Plaintiff was given notice of the EGM on 30 April 2010. The results of the EGM were duly made known to the Plaintiff. The Plaintiff at all material times expected the same to be honoured and were led to believe that the Defendants would not take steps behind the Plaintiffs back to in effect reverse the results of the EGM.

[14] The plaintiff pleaded that the OS order was obtained in breach of the express terms of the RCSLS trust deed and the RCSLS conditions; that the defendant banks did not join the plaintiff in the OS proceedings nor did these defendant banks give the plaintiff any notice of the OS. Further, it was alleged that the defendant banks 'did not establish to the objective satisfaction of the court that the trustee had acted or conducted itself capriciously'.

[15] Specifically against the trustee, it was alleged at para 18 of the amended

statement of claim that the trustee 'did not contest the lenders' claim in the OS. In the premises, by an order dated 27 October 2010, the reliefs claimed by the lenders in the OS was granted against the 12th defendant (the 'OS order'), and the 12th defendant was ordered to, inter alia, realized the security furnished by the plaintiff under the Security Trust Deed. The said OS materially prejudiced the plaintiff and continues to prejudice the plaintiff'.

[16] In the ensuing paragraphs, the plaintiff claimed that upon becoming aware of the OS order, it 'timeously applied to intervene in the OS to have the OS Order set aside'. After referring to its unsuccessful appeal at the Court of Appeal and unsuccessful application at the Federal Court, the plaintiff claimed that the 'Federal Court in refusing leave to appeal declined to revisit its decision in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 (Staghorn). The plaintiff further claimed at para 19A that the Federal Court in 'declining to allow the plaintiff's application for leave to appeal against the Court of Appeal's said decision orally expressed the view that the plaintiff is at liberty to file a fresh suit to set aside the OS order'. At para 20 of its statement of claim, the plaintiff claimed that 'On 31 January 2011 the plaintiff filed suit in the High Court at Shah Alam in Civil Suit No. 22 NCvC-131-2011 for, inter alia, the removal of the 12th defendant as trustee ('the Shah Alam Suit')'.

[17] From para 21 onwards, the plaintiff proceeded to set out the causes of action and the reliefs that it sought. This is critical and I shall set them out in detail:

> 21. For the reasons pleaded hereinbefore, the lenders acted in breach of the express terms of the RCSLS Trust Deed and the RCSLS Conditions.
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> 22. Further, the OS Order was obtained in breach of the express terms of the RCSLS Trust Deed and the RCSLS Conditions, and without giving the Plaintiff due notice of the OS and due opportunity to be heard even though the OS Order substantially affects the Plaintiff in particular its assets including immovable properties and even though the making of the OS Order requires the question of whether the Plaintiff is indebted to the 1st to 11th Defendants in the first place to be deliberated and a finding that the Plaintiff is so indebted. The said Order is accordingly a nullity and the Plaintiff is entitled to have it set aside ex debito justitiae under inter alia the inherent powers and jurisdiction of this Court.

[18] At para 23, the plaintiff elaborated on the causes of action. It alleged that:

> (a) the Lenders knew that they would be unable to obtain a special resolution to compel the 12th Defendant to declare an Event of Default, to take all steps and action against the Plaintiff to enforce the payments of all amounts said to be due

and payable under the RCSLS Trust Deed and to realize the security in accordance with the Security Trust Deed;

(b) the Lenders knew that the Plaintiff would be prejudiced by the terms of the OS order in that, among other things, if the 12th Defendant was compelled to declare an Event of Default, it is the Plaintiffs assets which have been pledged or assigned as security for the RCSLS and which would be liable to be realized by the 12th Defendant;

(c) the Lenders therefore deliberately omitted making the Plaintiff a party to the OS, failed to serve the OS on the Plaintiff; withheld notice of the OS from the Plaintiff and/or caused the Plaintiff to be denied the right and the opportunity to be heard;

(d) the Lenders did not bring or properly bring to the Court's attention the relevant clauses/provisions as set out in paragraphs 8-12 above and their effect on the factual matrix of the matter, in particular the facts as stated in paragraphs 14-16 above, and that there is no event of default under the provisions of the Trust Deeds concerned;

(e) the Lenders' conduct was actuated by bad faith as they knew that in prosecuting the OS, they were acting in breach of the RCSLS Trust Deed and the RCSLS Conditions;

(f) the said OS Order was procured without due notice to the Plaintiff, made in breach of the Plaintiffs right to be heard and has offended the rules of natural justice/the audi alteram partem maxim;

(g) … the said Order materially prejudiced the Plaintiff and continues to prejudice the Plaintiff;

(h) in procuring the OS Order in breach of the express terms of the RCSLS Trust Deed and RCSLS Conditions, and without giving the Plaintiff due notice of the OS, the Lenders had procured the OS Order in abuse of process.

Consequently, as an alternative to the averment that the OS Order is a nullity, it was pled that 'the OS Order was irregular, and the Plaintiff is entitled to have the OS Order set aside ex debito justitiae under the, inter alia, the inherent powers and jurisdiction of this Court'.

[19] At paras 24–25 of the amended statement of claim, the plaintiff further and in the alternative alleged that the defendants 'or any combination of them', wrongfully and with intent to injure the plaintiff and/or to cause the plaintiff loss by unlawful means, had conspired to deny and/or interfere with the plaintiff's rights under the RCSLS trust deed and/or to cause the realisation and disposal of the plaintiffs assets pledged under the security trust deed. Those efforts of the defendants were alleged to have been done with the 'sole or predominant intention of injuring the plaintiff and/or denying the plaintiffs rights under the RCSLS Trust Deed'.

[20] At para 26, the plaintiff alleged:

Pursuant to and in furtherance of the conspiracy pleaded in paragraph 24 and/or 25 above, the Defendants collectively or otherwise carried out the following unlawful acts by which the Plaintiff was injured:

(a) in breach of the RCSLS Trust Deed, the 1st to 11th Defendants procured the OS Order …;

(b) in breach of the rules of natural justice, the Defendants did not inform the Plaintiff of the OS proceedings and procured the OS Order without giving the Plaintiff an opportunity to be heard on the same …

(c) in abuse of process, failed to draw the Court's attention to the relevant clauses/provisions … and their effect on the factual matrix of the matter in particular the facts as stated in paragraphs … above.

[21] As a result of the alleged conspiracy, the plaintiff claimed to have suffered loss and damage. Apart from a claim for exemplary damages and an order that the defendants be restrained, 'the defendants will enforce the OS order and dispose of the plaintiffs assets, thereby causing the plaintiff further losses'. The primary reliefs sought by the plaintiff as found at para 30 are:

(a) a declaration that the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337 of 2010 dated 27 October 2010 is null and void and of no effect;

(b) alternatively, a declaration that the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337 of 2010 dated 27 October 2010 is irregular;

(c) a declaration that the defendants are not entitled to enforce the RCSLS trust deed pursuant to the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337 of 2010 dated 27 October 2010 or otherwise;

(d) an order that the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337 of 2010 dated 27 October 2010 be set aside;

(e) alternatively, an order restraining the defendants from enforcing or otherwise acting on the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337 of 2010 dated 27 October 2010; and

(f) a declaration that the first to 11th defendants acted in breach of the terms of the RCSLS trust deed in obtaining the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337 of 2010 dated 27 October 2010.

[22] It can be seen that broadly, the claim of the plaintiff is that the OS order is null and void and consequently ought to be set aside *ex debito justitiae*. Summing up the plaintiffs claim, it can be seen it is premised on the OS order

being procured in breach of the express terms of the RCSLS trust deed and RCSLS conditions, that there were violations of the rules of natural justice in that there was no due notice to the plaintiff of the OS proceedings; and that there was no due opportunity given to the plaintiff to be heard before the OS order was rendered. Further, it claimed that the OS order substantively affected the plaintiff, especially in respect of its assets and as such, cannot be made without deliberating the question of whether the plaintiff was in the first place indebted to the defendant banks.

[23] The further allegation is that there was conspiracy between the defendants to deny and/or interfere with the plaintiff's rights under the RCSLS trust deed and/or to cause the realisation and disposal of the plaintiffs assets pledged under the security trust deed. Those efforts of the defendants were alleged to have been done with the 'sole or predominant intention of injuring the plaintiff and/or denying the plaintiffs rights under the RCSLS Trust Deed'.

APPLICATION FOR AN INTERIM INJUNCTION

[24] Enclosure 3 is the plaintiff's application for an interim injunction to restrain the defendants 'from enforcing or otherwise acting on the order in Kuala Lumpur High Court Originating Summons No D-24NCC-337-2010 dated 27 October 2010 (OS order)' pending the disposal of the present suit. The application filed on 29 September 2011 was opposed by the defendants. The parties were given time to file their respective affidavits in response and the application fixed for disposal on another date.

[25] As it turned out, much happened during the intervening period. Quite apart from the filing of affidavits and affidavits in reply in relation to the plaintiff's application for an interim injunction, there was an application to intervene by a third party which was subsequently withdrawn, as well as the defendants' separate applications to strike out the plaintiff's claims, and then an 'eleventh hour' filing and service of an amended statement of claim in the present suit, such that this application was almost overtaken. It was finally decided that the defendants' separate applications to strike out the plaintiffs suit be deferred till after the disposal of this application in view of the urgency of the matter and because of the amended statement of claim which had a pleaded fresh charge of conspiracy between the two sets of defendants.

[26] Extensive and comprehensive oral and written submissions were made by all parties. In substance, the plaintiff claimed that an interim injunction in the terms sought ought to be granted as the requisite conditions as pronounced in *American Cyanamid Co v Ethicon* [1975] AC 396 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 had been met. Mr Edwin Lim, learned counsel for the plaintiff elaborated on the

background facts and reiterated the allegations identified earlier. He emphasised that the OS order was obtained in breach of the express terms of the RCSLS trust deed and the RCSLS conditions; that it was made without giving the plaintiff due notice of the OS and due opportunity to be heard even though the order substantively affects the plaintiffs assets, especially its immovable properties. He also asserted that the OS Order required the question of whether the plaintiff is indebted to the defendant banks in the first place to be deliberated and a finding that the plaintiff is so indebted. By obtaining the OS order contrary to these contentions, it was said that the defendants had 'rewritten the terms of the Trust Deeds concerned when they ought not to be permitted to do so'.

[27] The plaintiff identified six issues said to be serious issues or questions to be determined at trial, namely:

(a) whether the defendant banks breached the express terms of the RCSLS trust deed and the RCSLS conditions;

(b) whether the defendant banks breached the rules of natural justice when it obtained the OS order in breach of the express terms of the RCSLS trust deed and the RCSLS conditions; without giving notice of the OS to the plaintiff such that the plaintiff was denied an opportunity to be heard; the OS order thereby a nullity which the plaintiff is entitled to set aside ex debito justitiae;

(c) whether the defendant banks obtained the OS order in bad faith by deliberately omitting to give notice to or make the plaintiff a party to the OS; despite knowing that they were unable to obtain a special resolution to compel the trustee to act on the RCSLS trust deed and that the plaintiff would be prejudiced by the terms of the OS order;

(d) Whether the defendant banks obtained the OS order in bad faith as they did not properly bring to the court's attention the relevant clauses/provisions and their effect on the factual matrix;

(e) whether the defendant banks acted in abuse of process in procuring the OS order in breach of the express terms of the RCSLS trust deed and the RCSLS conditions and without giving the plaintiff notice of the OS; and

(f) whether there was a conspiracy.

[28] Mr Lim submitted that the requirement that there be serious issues or questions to be tried is one with a low threshold – *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 3 SLR 333. So long as the 'plaintiff has prospects of success which, in substance and reality, exist', that is said to suffice. It is only where the plaintiffs prospects are so poor that they lack substance and reality that it can be said that there are no serious questions or issues to be tried

as decided in *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132 in which case the application for an interim injunction will be refused. Learned counsel urged the court not to 'resolve these serious and difficult questions of law at that stage of the litigation' as indicated by the Federal Court in *Si Rusa and Keet Gerald*. It was Mr Lim's submission that there were real prospects of success on the issues identified.

[29] The application was opposed. Miss Yoong and Mr Yap made separate but substantially similar submissions and they adopted one another's submissions. I shall summarise those submissions. First and foremost, the defendants contended that the questions or issues identified had all been decided and cannot be reopened. In short, they relied on the application of the principle of res judicata. They further argued the following:

(a) that damages were adequate remedy if the injunction was not granted;

(b) that the balance of convenience was in favour of the defendants;

(c) that there were available alternative remedies;

(d) that there will be injustice to the defendants if the injunction was granted;

(e) that the plaintiff had come to court with unclean hands;

(f) that there has been an abuse of process; and

(g) that there has been failure to pay by the plaintiff.

[30] After having considered learned counsel's oral and written submissions, the related affidavits as well as the pleadings available to date, I agreed with the submissions of the defendants. Most of the related cause papers can actually be found in more than one of the affidavits filed by the various parties. For convenience and as was referred to in the course of the proceedings by all counsel and the court, I shall refer to those found in encls 12 and 22; which are the affidavits in reply of the trustee and defendant banks respectively; save as otherwise expressly stated.

[31] I am indeed mindful of the task at hand. As reminded by the Supreme Court in *Tien Ik Sdn Bhd v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689,700 that at the hearing of an application for an interim injunction, the judge '… should not have dealt with the application in such a manner so as to give the impression in his judgment that he had in fact disposed of the originating summons itself on its merits based on the affidavits of the parties to the application. It is necessary to bear in mind in an application for an interim injunction that the court is not called upon to make any final decision on any question of fact. What is relevant and required at that stage is for the learned judge to decide on the affidavits before him that the claim in the originating

summons is not frivolous or vexatious, in other words, that there is a serious question to be tried and having so decided he must go on to consider the question of balance of convenience'. Nevertheless, despite undertaking that line of inquiry along the principles enunciated in *American Cyanamid* and adopted in *Keet Gerald* at p 206, with respect, despite the low threshold, none of the issues or questions identified by the plaintiff is a bona fide serious issue for trial.

[32] The respective defendants have carefully compared each of those issues identified by the plaintiff against the earlier OS proceedings and the Shah Alam Suit and have found each of them canvassed today had quite clearly been very carefully and extensively articulated by learned counsel for the plaintiff, and responded to by the defendants in not just the OS proceedings but also the Shah Alam Suit. From my own scrutiny of the related cause papers and the submissions, I agree.

[33] Both learned judges in those proceedings had also dealt with and disposed of those same issues, though not necessarily for the same reasons. The related memorandum of appeal further shows the reliance of the plaintiff on the same issues for consideration by the Court of Appeal which ended not in the plaintiffs favour. In such circumstances, it cannot be denied that the principle of res judicata is indeed engaged in the facts of this case to prevent a re-litigation — *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, *Hartecon JV Sdn Bhd Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104.

[34] In order to appreciate this, it is appropriate to examine what transpired in the OS proceedings and the Shah Alam Suit. Starting with the OS proceedings, we pick up from the plaintiff's application to intervene. The summons in chambers filed can be found at p 353 of encl 22 where the plaintiff sought:

(a) leave to intervene and that the plaintiff be made a defendant;

(b) in the event leave is granted, an order that the order dated 27 October 2010 be set aside; and

(c) upon being made a defendant, the plaintiff does the needful to defend the originating summons.

[35] That application was supported by an affidavit affirmed by Ong Kok Keng (Ong), the plaintiff's Head of the Legal Department (from p 374). After setting out the same factual background and arguments as are presented here, Ong averred at para 11 that the plaintiff was 'clearly possessed with a legal interest to have been named a party to the proceedings … must have been evident to the plaintiff herein upon a reading of the 1st Trust Deed and the 2nd

Trust Deed …' Ong then spent considerable time expanding on the plaintiff's interpretation of the trust deed and the impropriety of the OS order in law and on the facts which he said did not accord with his interpretation and that it amounted to the court 'rewriting' the provisions of the agreement between the parties — see para 18 at p 380.

[36] It was Ong's argument on behalf of the plaintiff, if not the main argument; that the 'condition precedent for the occurrence of an event of default both under the 1st Trust Deed and the 2nd Trust Deed has not occurred'; or that the events spelt out in the trust deed had not materialised. Under such conditions, the court 'could not have, and did not possess the jurisdiction to have made the order'; that the order was 'bad in law and must be set aside in limine'; that the order was 'invalid and/or defective on all grounds and which order, if permitted to be implemented will cause grave and irreparable injustice to the Intended Intervenor …' — see paras 20–24 at pp 380–383 of encl 22. It was also alleged that the order was obtained without the involvement of the plaintiff was 'clearly in breach of the rules of natural justice and cannot be allowed to remain — see paras 30–31, at p 384.

[37] This was the decision of the learned judge in the OS proceedings. It can be found at pp 593–598, and I shall set out the relevant portions of that judgment:

> This is my judgment relating to two interveners' application in essence seeking leave of court to intervene to set aside the order of the court, heard inter partes between the plaintiffs and the defendant and which has been perfected …
>
> I have read both the applications, affidavits, submission of the parties in detail. All the learned counsel have placed a comprehensive submission on technicalities as well as merits. I do not wish to repeat the same save to address the core issues. I take the view that encll 13 and 10 must be dismissed. My reasons, inter alia, are as follows:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) ...
>
> (g) Even on merit relating to the application I agree with the submission of the learned counsel for the plaintiffs and defendant that encll 13 and 10 must be dismissed.

[38] From the above, it can readily be seen that the plaintiff's application was

fully considered, both on 'technicality' or from the threshold perspective and on the merits. 'Merit' must surely mean whether the plaintiff had valid grounds or reasons to intervene and set aside the OS Order. The learned judge did not think so and proceeded to dismiss the application.

[39] The plaintiff appealed against the whole of that decision. This is evident from the memorandum of appeal found at pp 601–605. The Court of Appeal did not agree with the plaintiff. On 27 April 2011, after reading the appeal record, the submissions and after hearing the respective counsel, the Court of Appeal unanimously dismissed the appeal with costs; and affirmed the decision of the learned judge in the OS proceedings. This is quite apparent from the terms of the sealed copy of the order of the Court of Appeal. As mentioned earlier, leave to appeal to the Federal Court was refused on 29 June 2011.

[40] Apart from the affidavits filed in support of the matters prayed for in the plaintiff's intervemor application, the numerous submissions of the plaintiff filed before the various courts are extremely insightful. Similarly, the written submissions filed by the respective counsel for the trustee and the defendant banks. The contents of those submissions confirm my concerns and findings. When examined, it will be readily appreciated that these issues presently made were quite fully and exhaustively canvassed in the OS proceedings and the related appellate proceedings. More importantly, those issues have been determined and are no longer open for reconsideration, least of all by this court.

[41] Just to illustrate my finding, I shall point to some of them. In full, clear and comprehensive written submissions and submissions in reply filed at the first instance in the OS proceedings, the plaintiff elaborated on those same matters some of which I have highlighted here (pp 462–486; 502–522):

(a) that the originating summons was clearly premised on the trust deeds which had the direct involvement of the plaintiff. In choosing to proceed to procure the OS order without naming the plaintiff as a party to the OS proceedings, there was 'blatant breach of the principles of natural justice and in particular the audi alteram partem rule …', resulting in the OS Order being 'bad in law and which ought to be set aside ex debito justitiae';

(b) that the justification for the OS Order was the provisions of the trust deed which the plaintiff invited the court to read. When read in its entirety and in the manner as suggested by the plaintiff, the plaintiff said that it 'must follow that if in the first place the Defendant could not have declared an event of default and in consequence there is no occurrence of an event of default, there is no way the Plaintiff can compel the Defendant to do something which the Defendant is contractually not empowered to do';

(c) that the court 'was clearly not possessed with the jurisdiction to have entertained the Plaintiffs' Originating Summons application and to have made the 27.10.2010 Order';

(d) that the OS order was 'clearly bad in law on all accounts and which the interest of justice cries to be ordered to be set aside';

(e) that the court is a 'Court of law and not a Court of morals'; and

(f) that the OS order is a nullity and can be set aside ex debito justitiae even where the court is functus officio as the 'Court is possessed with an inherent jurisdiction to set aside an Order, albeit final and perfected on the ground that the Order is null and void'.

[42] At the Court of Appeal (Civil Appeal No W-02-(IM)(NCC)-347 of 2011), the submissions can be found at pp 437–474. Again, the submissions are very extensive and comprehensive. After dealing with the background facts, the plaintiff again addressed the matter of the decision in the OS proceedings being void for violations and non-observance of the rules of natural justice which would invalidate the exercise of power by the learned judge. Thereafter, the plaintiff submitted on the issue of functus officio and the decision of the Federal Court in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghom Sdn Bhd and other appeals* [2008] 2 MLJ 622. The plaintiff expounded on the court's inherent jurisdiction to set aside an order, albeit final and perfected where the order is null and void. The decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and other similar decisions were cited, closely examined and relied on by the plaintiff. At para 78 of the plaintiff's submissions seen at p 459, the plaintiff submitted:

78. If, contrary to what is stated in 64 above, the 27.10.2010 order is to be deemed a final order, then the Appellant submits that, that order is an order which is 'null and void' on ground of illegality or lack of jurisdiction, enabling the Appellant, the affected party by the said order, to apply to set aside the order ex debito justitiae.

79. This then is the reference in Herman Ando to the exceptions expressed in Badiaddin.

[43] In the concluding paragraphs of the plaintiffs submissions, the plaintiff, inter alia, urged the Court of Appeal to set aside the order in limine, 'on grounds of very serious procedural irregularity and touching on the principles of natural justice the 27.10.2010 order cannot be permitted to stand in the face of law, and must be set aside'; that 'even on the merits the 27.10.2010 order cannot stand and therefore must be set aside'. The Court of Appeal was also invited to allow the appeal and 'make any consequential orders or directions as this Honourable Court may deem fit to make in the circumstances of the matter'.

[44] I do not propose to set out the respective the defendants' arguments in those proceedings save to say that each of those issues identified by the plaintiff was responded to by the the defendants as can be seen from all their written submissions which have also been exhibited in these present proceedings.

[45] Learned counsel for the plaintiff had attempted to argue that none of the causes of action in the present claim were actuated or addressed in their submissions for leave to intervene in the OS proceedings. When the application was dismissed, the learned High Court judge had done so only on the basis that the court was funtus officio as the final order had already been made and perfected. Under such conditions, the merits of the application to set aside the OS order did not arise. In fact, it was contended that the court there had made it clear that the proper forum to air any issues that the plaintiff might have as to the validity of the OS order was by way of a separate action:

> If the applicants have any grievance against the (OS Order) then the proper procedure is to bring a separate action and need be to seek appropriate relief from the court inclusive of damages.

[46] And, the present proceedings are said to be precisely those suggested proceedings. Learned counsel further submitted that any remarks made by the court in respect of the merits of setting aside the OS order was made obiter — *Rekbab Das v M Shobai and another* AIR 1923 Allahabad 495. In any case the remarks were a mere 'oblique reference to the merits made in the penultimate paragraph of the Intervention GD' where the learned High Court judge said:

> … even on merit relating to the application I agree with the submission of the learned counsel for the plaintiffs and defendant that (the intervener application) must be dismissed.

[47] In relation to the Court of Appeal and the Federal Court's dismissal of the plaintiff's appeal and leave to appeal, it was reiterated that it was always in relation to the issue of functus officio. The plaintiff also submitted that the Federal Court 'echoed' the High Court's view that the plaintiff was at liberty to file a fresh action to set aside the OS order.

[48] With respect, I disagree. From the submissions of the plaintiff who was the proposed intervener there, the plaintiff clearly and unequivocally submitted at para 4 (p 14 encl 7)):

> 4. It is also the respectful submission of the 'once the Intended Intervener is granted the leave to intervene in the proceedings vide the Originating Summons herein the order to set aside the 27.10.2010 Order must necessarily follow both on the facts and in law'.

[49] At para 6 of the same submission, the plaintiff further submitted:

> 6. If this Honourable Court is with the Intended Intervener in what is stated in the preceding paragraphs herein, and in particular paragraph 5 then there is no need for this Honourable Court to be troubled with anything further, including on whether there is a factual or legal basis as per the provisions of the two (2) Trust Deeds to have sought and obtained an order in terms of the 27.10.2010 Order.

[50] From the plaintiff's own arguments in respect of the OS order, the plaintiff itself had taken the position that the arguments were not piecemeal. The plaintiff had invited the court to take into account all the relevant factual background and weigh those reasons and legal reasoning of the plaintiff when considering the existence of the plaintiff's legal interests for intervention and, setting aside the court's earlier order. The matter of the court being functus officio, the interests of justice and, the principles as set in *Hong Leong v Staghorn* were all part of the whole consideration of the plaintiff's application. The plaintiff's approach was certainly the correct approach as arguments cannot be artificial and compartmentalised as if not related to each other when they glaringly are. Having taken that approach but receiving the results which it did not find favour with is no reason or justification to ignore the glaring pronouncements of the High Court in the OS proceedings. Worse, to ignore the affirmations of the OS order by the Court of Appeal and by inference, by the Federal Court when it refused to grant the plaintiff leave to appeal.

[51] I must add at this opportune moment, though I will return to this aspect later, that it was open to the appellate courts to set aside the OS order for any of the reasons proffered by the plaintiff. Which reasons I have repeatedly pointed out are the same reasons relied on in the present claim. Both the Court of Appeal and the Federal Court have the necessary or appropriate jurisdiction for setting aside that order. Yet, both courts declined. This aspect is extremely important as this adds another dimension to the operation of the principle of res judicata in that the issue of the invalidity of the OS order for the reasons put forth by the plaintiff has well and fully determined and cannot now be re-litigated.

[52] These same details were also examined in the Shah Alam Suit. The grounds of Madam Justice Lim Yee Lan can be found at pp 668–697 of encl 22 or pp 790–819 of encl 12. In refusing the application for an interim injunction, Her Ladyship found that there were no serious questions or issues to be tried; that damages would be an adequate remedy to the plaintiff; and that the balance of convenience did not favour the granting of the injunction. Her Ladyship added that the plaintiffs undertaking as to damages would be worthless as the plaintiff was already indebted to the defendant banks; and that the plaintiff had failed to come with clean hands. In fact, Her Ladyship held

that 'This whole application of the plaintiff in end (4) is without merit, frivolous and vexatious and an abuse of the process of the court.

[53] It is important to understand the reasons for Her Ladyship's decision. In finding that there were no serious questions or issues to be tried, Her Ladyship was unequivocal in concluding that the 'entire basis of the plaintiffs action herein against the first defendant was the trustee under the RCSLS trust deed are founded on breach of trust, breach of contract, negligence and mala fide viz-a-viz the plaintiff in contravention of the RCSLS trust deed. The allegations concern primarily the defendant's conduct in the KL Action'. For this, Her Ladyship agreed with the defendants' contention that the plaintiffs recourse was to have its complaints ventilated in the Court of Appeal. 'The plaintiff cannot attempt to circumvent the KL order by obtaining the injunction herein, which in effect is to stop the defendant from taking recovery action against the plaintiff'.

[54] But, that was not all that Her Ladyship decided. She also agreed with the defendants there that 'in any event, from the outset, the plaintiff's claim is bound to fail. The plaintiff is seeking through this action herein to, inter alia, perpetually restrain the defendant from taking any action at all against the plaintiff with regard to the RCSLS, This would clearly amount to interfering with the KL order'. Her Ladyship further found that there was no merit in the plaintiff's claim. It is not disputed that the plaintiff has defaulted in payment of the RCSLS nor that it is indebted to the intervenors under the RCSLS … Such failure to make payment under the RCSLS amounts to an event of default under the RCSLS … Having perused the relevant clauses of the RCSLS trust deed, I am of the considered opinion that the plaintiff's stand on the matter is totally erroneous and misconceived'.

[55] As mentioned earlier, Madam Justice Lim Yee Lan's decision was upheld on appeal on 4 October 2011 by the Court of Appeal.

[56] Bearing in mind that the real and single object of the plaintiff's complaints is to declare the OS order invalid and a nullity and by that reason to set that order aside; I must say that from the totality of the facts presented and having taken all evidence into due regard, including the comprehensive submissions of counsel, it is my considered view that no bona fide serious issues or questions had been disclosed. The issues or questions posed have already been addressed and answered in the earlier two proceedings and cannot now be reopened.

[57] It is patently clear that the plaintiff's reasons or basis of complaints evolve from its own interpretation and construction of the terms of the RCSLS

trust deed and the RCSLS conditions. That is not and never is a basis to declare any order of court a nullity or even challenge what is otherwise a perfectly regular order of court.

[58] With this, the application should stand refused. In any case, from my assessment, the harm and injustice that the injunction sought by the plaintiff would produce by its grant would far outweigh any harm that would result from its refusal bearing in mind that the primary object of this whole exercise is to set aside what is a perfectly regular order of a court of coordinate jurisdiction, which order has further been affirmed by the appellate courts. It must not be forgotten that the remedy here is discretionary. I cannot see a just result being produced if the interim injunction is granted with all these considerations that I have already pointed out.

[59] Further, it is my view that damages are adequate remedy to the plaintiff as can be seen from the facts of the case. This was the finding of the learned judge in the Shah Alam Suit and I do not find the present circumstances any different from those then presented. In this regard, I must also say that from the relative financial standing of the litigants before me, the plaintiff actually does not have the ability to meet the undertaking in damages should this action fail. On the contrary, the defendants are in the position to meet any monetary compensation that the plaintiff may obtain in the event its claim is successful. The undertaking required would therefore be of little value. There is also this matter of the uncontroverted fact that the plaintiff stands in debt to these defendants. With the multiple suits filed, all in respect of the same complaint, there is what I would term action akin to abuse of process in such repeated exercises on the part of the plaintiff. Such acts must be stopped to prevent abuse and a loss of confidence in the legal and judicial system. It is obvious that under such circumstances, the balance of convenience does not lie in the plaintiff's favour.

[60] The application in encl 3 is therefore dismissed with costs of RM35,000 to the trustee and RM40,000 to the defendant banks to be paid forthwith to the defendants. These sums were suggested by learned counsel. Having regard to the arguments and the documents filed as well as the complexity of the arguments, I agree to these sums being suitable costs.

ERINFORD INJUNCTION

[61] Being dissatisfied with my decision, the plaintiff appealed. By encl 42, the plaintiff then sought an order that my decision refusing the plaintiff's application for an order restraining the defendants from acting on the order granted in the High Court at Kuala Lumpur Originating Summons No D24-NCC-337 of 2010 ('the OS') dated 27 October 2010 be injuncted

pending disposal of the appeal; in what is generally referred to as an 'Erinford injunction'. Such injunctions are granted on the possibility that the judgment may be reversed or varied. In *Erinford Properties Ltd v Cheshire CC* [1974] Ch 261, at p 268:

> Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting any injunction at all.

[62] The reason why the injunction is sought is because the plaintiff claimed that there was every likelihood that its assets, worth close to RM200m, would be disposed off whether in part or in toto to third parties by the trustee under the power of attorney that it holds before the appeal to the Court of Appeal can be heard. The consequences to the plaintiff were said to be irremediable. In particular, the plaintiff focused on one of those assets liable to be disposed, that is its HQ.

[63] According to the plaintiff's counsel, the HQ serves as the plaintiff's principal place of business from where it had been operating for over 15 years. Much goodwill and reputation which had accrued was said to be at risk of damage should the plaintiff be evicted. The plaintiff further claimed to be receiving regular income from renting out part of those premises. This 'vital cashflow necessary for the continued existence of the plaintiff as a going entity' was also said to be liable to be adversely affected if an erinford injunction was not granted. The plaintiff further claimed that the assets would be sold at distress prices leaving damages as inadequate remedy for the plaintiff.

[64] Once again, all parties had ample opportunities to ventilate their arguments and file or rely on their earlier affidavits and response affidavits. The plaintiff relied on the principles as set down in *Erinford Properties Ltd v Cheshire CC* [1974] Ch 261, *Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd*, *Subashini Rajasingam v Saravanan Thangathoray (No 2)* [2007] 4 MLJ 97; [2007] 3 CLJ 209, *Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (Receiver and Manager appointed)* [2008] 1 MLJ 317. The principle for a grant of an Erinford injunction is where it is shown that the applicant is exercising his

right of appeal and that appeal is not a frivolous, the injunction would be granted to prevent the appeal from being rendered nugatory. There is of course, the consideration of the overall justice of the case and as to whether damages would be an adequate remedy.

[65] From the submissions made, I find that the plaintiff's concerns of its assets are, as described by Miss Yoong 'more sentimental than real'. She reminded that it must not be forgotten that the plaintiffs HQ is actually amongst the assets which are in fact the charged assets for the RCSLS. Insofar as the plaintiff's concerns over its reputation and what it perceives to be potential loss of goodwill in the event it is evicted from its premises, its concerns are far different from the situation in *Celcom (Malaysia) Bhd v Inmiss Communication*. There, the company was faced with a winding up petition with its attendant ramifications and negative perceptions. It was in that regard that the injunction was entertained.

[66] I agreed with the submissions of the defendants. I did not find any evidence whatsoever that unless restrained there was every likelihood that the plaintiff's assets would be disposed off before the plaintiff's appeal against the refusal for an interim injunction is heard by the Court of Appeal; that the plaintiff's appeal would be rendered nugatory; that the plaintiff will suffer irreparable harm and damage which cannot be compensated by damages; or that the plaintiff will cease to be an ongoing concern affecting the rights of its shareholders; or because the plaintiff's appeal had merits.

[67] The substantive application for an interim injunction had been dismissed because the primary conditions for such an interim relief were not met. Those conditions remain unchanged and there has been no development since the dismissal of the application to warrant the concerns of the plaintiff. Other than the issuance of an enforcement notice dated 24 November 2010 which was issued even before this claim was initiated, nothing else has been done. No steps have been taken by any of the defendants for a long time towards the execution of the OS order. The conditions for maintaining status quo are not presented here.

[68] Again, I found that justice of the case did not lie in granting the order sought and accordingly, I dismissed the application with costs to be determined upon disposal of encll 21 and 30 which are applications filed by the defendants to strike out the plaintiff's claim.

STRIKING OUT APPLICATIONS - ENCLOSURES 21 AND 30

[69] The defendant banks' application is found in encl 21 while the trustee's

application is in encl 30. Both applications seek to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19(1)(a)–(c) of the Rules of the High Court 1980.

[70] I shall take both applications filed by both sets of the defendants together since the applications rely on the same facts and reasons. Those facts and substantive portions of the claim have already been set out earlier. The defendants principally rely on the application of the principle of res judicata. I shall deal with this issue shortly.

[71] But, first things first. One must not lose sight of the fundamental fact that at the heart of the plaintiffs complaint is the OS order made by the High Court. The primary object of the plaintiffs claim is to set aside that order. This court is in fact being asked to set aside an order made by another court of co-ordinate jurisdiction. The glaring truth of the matter is that this court has no jurisdiction to do so.

[72] In *Hock Hua Bank v Sahari Murid* [1981] 1 MLJ 143 and even in *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, the Federal Court reminded that there is no jurisdiction to set aside a final order made by a court of concurrent jurisdiction that has been regularly obtained:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court' … which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.
>
> In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, 736 Lord Diplock LJ (now a Law Lord) said (at p 736) that it has been long laid down that where an order is a nullity; the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.
>
> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the doors of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.

[73] This point was also observed by Madam Justice Lim in her decision too citing the decision in *Overseas-Chinese Banking Corporation Ltd v Sindoma Realty Sdn Bhd and Other Applications*; *Sindoma Realty Sdn Bhd v Overseas-Chinese Banking Corpo Ltd & Others* [1989] 1 MLJ 377 where it was held that 'one High Court has no jurisdiction to restrain the order of another High Court of co-ordinate jurisdiction'. Her Ladyship also relied on the Court of Appeal's decision in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 and *J&C New Consortium Sdn Bhd (Malayan Banking Bhd, Garnishee & Anor* [2006] 1 MLJ 587 that the 'Courts, as a general rule, will not even allow an interim injunction to stay proceedings or restrain the execution of an order by a court of co-ordinate jurisdiction'.

[74] Be that as it may, it can be seen that the Federal Court recognised that there is 'one special exception to this rule and that is 'where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where … a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court …'.

[75] This 'special exception' or 'third ground' when a decision of a court of co-ordinate jurisdiction may be set aside is where that decision had been procured in violation of the rules of natural justice. It is on that third platform that the plaintiff is now founding its claim which it claims the High Court and later the Federal Court indicated it should take. The plaintiff alleged that the OS order has to be set aside because the defendants' acts that led to the OS

order amounted to breach of natural justice for all those reasons that the plaintiff has alleged. Founding an action that seeks to revisit the terms of what must is a regular order made by a court of competent and full jurisdiction with the sole purpose of setting that order aside requires the action to be founded on facts which renders the case to be a 'special exception' to the fundamental rule. That is what a setting aside of a null and void order is all about. The first order in question has to reek or smack of illegality or lack of jurisdiction; or a violation of the rules of natural justice.

[76] With respect, the plaintiff's complaint does not come anywhere close to that meaning and understanding of a 'special exception'. Neither the pleaded case nor the affidavits filed reveal that the plaintiff's causes of action lend themselves to the remedy of setting aside what is otherwise a perfectly regular and final order made by a court of competent concurrent jurisdiction. Bearing in mind that the decision in the OS proceedings had reached the apex court, the situation which the Federal Court in *Hong Leong v Staghom* at p 650 'dread to think of is now being pursued by the plaintiff. Such pursuits which are akin to abuse must be arrested in their tracks.

[77] On the contrary, it is plain and obvious that the plaintiff's pleaded case and the evidence offered do not and cannot in any way show that the OS order amounts to a contravention of some written law. The pleaded case also does not even offer a prima facie case that the OS order contravenes the rules of natural justice or that it 'defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction'. It is obvious that the plaintiff cannot make that allegation or contention simply because there is no basis.

[78] The amendments to its statement of claim makes no difference as the allegation of conspiracy and collusion were already earlier raised in the OS proceedings. When rejecting the plaintiff's application, no distinction was made to any of the pleas or allegations raised by the plaintiff. All of the pleas or allegations were wholly rejected by the High Court as warranting reason for interference in its earlier decision. The plaintiff's claim relies on precisely the same facts and issues which have been repeatedly addressed and found wanting. An action founded in such circumstances plainly and obviously is bound to fail and ought to be dismissed under O 18 r 19(1) of the Rules of the High Court 1980.

[79] Further, the observations of Lord Diplock in *Grafton Isaacs v Emery Robertson* [1985] 1 AC 97 should well be remembered. Lord Diplock rejected the legal aspects of voidness and voidability in orders of the court that are revisited with the purpose of setting what would otherwise be regular orders of court. At p 102, His Lordship said:

Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the description 'void' and 'voidable' respectively have been applied can be found in the opinions given by the judicial committee of the Privy Council in the appeals *Marsh v Marsh* [1945] AC 271, 284 and *MacFoy v United Africa Co Ltd* [1962] AC 152, 160; but in neither of those appeals nor in any other case to which counsel has been able to refer Their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of the rules of natural justice.

The contrasting legal concepts of voidness and voidability form part of the English Law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

[80] Lord Diplock however was prepared to uphold the existence of a limited category of orders of court that a person affected by the order may have the order set aside ex debito justitiae under the court's inherent jurisdiction. Such power is only exercised where there was illegality or lack of jurisdiction.

[81] The reasons for this cautious but prudent approach are obvious. Even Azmi FCJ in *Badiaddin* was cautious when His Lordship 'hasten to add that apart from breach of rules of natural justice, in any attempt to widen the doors of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction'. Such powers must be used only in the rarest of rare cases as otherwise the judicial system as we have

come to be associated with will be seriously undermined. The examination of all the facts and actions taken to date, particularly by the plaintiff, point unwaveringly to a picture that is not in the least in the plaintiff's favour.

[82] As observed earlier by myself and Justice Lim Yee Lan in her judgment, the plaintiff's complaint is really over the earlier court's interpretation of the terms and conditions in the trust deed, in particular cll 8 and 8A. The plaintiff takes the view that if read and interpreted in the manner proposed by the plaintiff, the order would not have been granted. In short, the plaintiff disagrees with the interpretation of the court in the OS order.

[83] Even on a careful scrutiny of the trust deed and the RCSLS conditions that the plaintiff had offered in the affidavits filed do not support that contention of the plaintiff, nowhere is there expressed and inferred of an obligation that the order sought cannot be sought or obtained by the defendants. Nowhere too is there any express or inferred obligation imposed on the defendants that the plaintiff must be notified of any application to court in the event of any of the defendants seeking for an order of the nature finally obtained by them.

[84] I observed that the plaintiff's allegations concerned their non-involvement in the OS order even though that order substantially affects its assets; and required the deliberation first of whether it is indebted to the first to 11th defendants. The relationship between the parties is at all times contractual. Having quickly run through the trust deeds, I cannot find any provisions requiring notification as claimed by the plaintiff. Now, the right to be heard in the sense alleged by the plaintiff is actually within the jurisdiction and discretion of the court and not, with respect, the parties. When seen in its true light, it is obvious that an allegation of such a nature actually cannot be made. The court in the OS proceedings had before it the same entire documents the plaintiff are currently relying on. It is that court which is the best and most appropriate court to determine the merits of the defendants' application. Determining merits would include amongst other considerations, the rights and complaints of the parties before the court; the contents of the cause papers, submissions made by attending counsel; as well as the court's powers and ail these are finally reflected in the terms of the OS order granted. It is not a default or ex parte order and that is significant. If the allegations presently claimed by the plaintiff are allowed, it would certainly open floodgates to this extremely limited area of jurisdiction which this court has in the first place.

[85] The OS order is obviously a regular order. As pointed out by Lord Diplock, such an order can only be set aside by an appellate court upon appeal if there is one to which an appeal lies. In this respect, the plaintiff has already

approached the Court of Appeal and even the Federal Court, yet both courts have refused to intervene. It was open to the Court of Appeal and without doubt, the Federal Court to intervene in the face of such strong allegations by the plaintiff. Yet, both courts did not. In the case of the Court of Appeal, its affirmation of the OS order must be taken into serious regard. No longer is this just a case of setting aside of an order made by a court of co-ordinate jurisdiction, indirectly, it is also the setting aside of a decision of the Court of Appeal. This court certainly has no jurisdiction to do that and will refrain from even entertaining the suggestion.

[86] Under such conditions, it is plain and obvious that the plaintiff's claim is unsustainable. This is a suitable case for the claim to be struck out and I do so accordingly.

[87] This brings me now to the issue of res judicata. As I had earlier said, the defendants have argued res judicata and the plaintiff have defended its application. Without resetting out the arguments, suffice to say that I wholly agree with the submissions of the defendants. When the learned judge dismissed the plaintiff's application to intervene, His Lordship did so on the 'merits' as well. It was contended that since the court was of the view that it was functus officio, then the ensuing ruling of the court on the merits are all made obiter. That being so, the doctrine of res judicata did not operate.

[88] With respect, that is quite incorrect. The remarks made by the learned judge in respect of a filing of a fresh action would be what is properly considered obiter. His Lordship's view on the merits of the application was entirely in agreement with the submissions of the defendants and that formed the second basis of the decision. In dismissing the plaintiff's appeal against the OS order, the Court of Appeal categorically affirmed the High Court's decision in its entirety. That would include the decision on the merits of the arguments.

[89] I must add that the arguments on breach of natural justice in the manner and nature now advanced before me were the same arguments made before the OS court and which did not find favour with the learned judge in the OS proceedings. This is evident from the application and affidavits filed, including from the extensive written submissions filed by the plaintiff. Yet, Justice Hamid Sultan did not see or agree with the basis for revisiting and setting aside his own earlier order ex debito justitiae, that is, because of the presence of breaches of natural justice in the manner identified by the plaintiff. That alone renders the instant claim bad by reason of the application of the principle of res judicata. The decision of the Court of Appeal affirming the decision of the High Court, and the refusal of the Federal Court in a certain sense, fortifies the application of the principle of res judicata here.

[90] Further, the principle of res judicata applied equally in relation to the decision in the Shah Alam court. In that suit filed against the trustee, the plaintiff sought for its removal on the basis of breach of duties and breach of the express terms of the trust deed. On an application of the principle of res judicata in the wider sense of issue estoppel, that decision in the Shah Alam court founded on the same facts suffice to bring into play the principle of res judicata. The decision in the Shah Alam Suit, though made in interlocutory proceedings, is nevertheless a final decision. Decisions made after arguments have been fully ventilated, especially when and where parties are represented are final as they can be. These decisions render the issues under consideration as adjudicated or judicata by the court.

[91] In the circumstances, I am amply satisfied that this is a suitable case to strike out what is plainly and obviously an unarguably unsustainable claim which is bound to fail if it were to proceed to trial. No benefit would be gained in sending all parties and the court into what would be a waste of valuable time, expense and effort. Although Stephenson LJ in *Riches v Director of Public Prosecutions* [1973] 1 WLR 1019 made the following remarks in relation to an application to strike out a claim for reason of limitation, I am of the view that the opinion holds equally true if not more in the context of the present case:

> … it would be absurd for the court, faced with an application such as this to strike out, under its inherent jurisdiction or under the rules, a claim as an abuse of the process of the court, to shut its eyes to the fact that there is going to be raised an apparently unanswerable plea of the Limitation Act 1939 … Why should such a claim not be an abuse of the process of the court? Why should not the court exercise its inherent jurisdiction to stay or dismiss an action which must fail? In my judgment, justice requires no further time or money should be wasted by either party on litigation which can only end with the failure of the plaintiffs claim. I therefore agree that, with both in justice and in mercy, we ought to put an end to it …

[92] Similarly, in my judgment, justice requires that no further time or money should be wasted by any of the parties to this litigation which can only end with the failure of the plaintiff's claim. Similarly, I agree that, 'with both in justice and in mercy, we ought to put an end to if. The plaintiff's persistent arguments based entirely on what is essentially the same facts and for the same reasons, though now couched in perhaps better terms due to hindsight, are for intents and purposes the same issues which had been finally adjudicated. Even if there is any difference, it is only in form and is caught by the wider principle of issue estoppel. As observed earlier, this borders on abuse of process and must be halted in its damaging tracks.

[93] Accordingly, encls 21 and 30 are allowed with costs of RM50,000 each to the defendant banks and trustee. The plaintiff's claims are struck out against

all the defendants here. The costs awarded here include the costs of the Erinford application. I am mindful that much of the arguments revolved around arguments already canvassed before the court in the earlier two applications — encls 3 and 42. The submissions in the present applications were very much facilitated by the fact that substantially similar arguments had already been made earlier.

Enclosures 3 and 42 dismissed with costs, encls 21 and 30 allowed with costs and claims against defendants strike out.

Reported by Ashok Kumar